

COMMENT

The Supreme Court, Collective Bargaining and International Law: A Reply to Brian Langille

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1. INTRODUCTION

In his paper entitled “Can We Rely on the ILO?” published in the preceding issue of this journal,¹ Brian Langille finds fault with the assertion by the Supreme Court of Canada, in the *B.C. Health Services* case,² that “collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of *Charter* guarantees.”³ The primary reason why Professor Langille rejects this proposition is that the Court constitutionalized an understanding of collective bargaining which includes an employer duty to bargain in good faith, and relied on international law as an interpretative aid in reaching that conclusion. In his view, the Court should not have done that, because international law does not include an employer duty to bargain.

Professor Langille also argues that the Supreme Court erred in referring to Canada’s international obligations in arriving at its decision. He tells us that Canada’s only international obligations with respect to freedom of association arise from its ratification of ILO Convention 87 on Freedom of Association and Protection of the

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1 (2006-2007), 13(3) C.L.E.L.J. 363.

2 *Health Services and Support-Facilities Subsector Bargaining Ass’n v. British Columbia* (2007), 283 D.L.R. (4th) 40 (S.C.C.).

3 *Ibid.*, at para. 20.

Right to Organise, which makes merely sparse reference to collective bargaining. Most international law on collective bargaining stems not from Convention 87 but from another ILO instrument, Convention 98 on the Right to Organise and Collective Bargaining. Since Canada has not ratified Convention 98, the Supreme Court, according to Professor Langille, was wrong to refer to it and to the jurisprudence it has given rise to.

Much of Professor Langille's argument is intended to demonstrate that the Supreme Court misconstrued what he describes as Canada's "international *legal* obligations."⁴ But the Court never used that phrase. It referred simply to "Canada's international obligations,"⁵ whether legal or extralegal, and it used those obligations only as an aid in interpreting Canadian domestic law as set out in the *Charter of Rights and Freedoms*. The Court made clear that "[u]nder Canada's federal system of government, the incorporation of international agreements into domestic law is properly the role of the federal Parliament or the provincial legislatures" rather than of the courts.⁶ To that end, the Court drew upon the jurisprudence of the ILO's Committee on Freedom of Association (CFA). This jurisprudence has been developed in part by CFA cases scrutinizing Canadian law, and whether it is legally binding or not, it certainly applies to Canada. It is an integral part of international law, and it has acquired a high degree of prestige and respect.⁷

In any event, even if the Supreme Court was indeed seeking to establish Canada's *legal* obligations when it referred to the jurisprudence of the CFA, the Court was on firm ground. A central proposition in Professor Langille's critique is that the substantive legal obligations of ILO member states flow solely from ratified conventions. "It is absolutely clear under the ILO constitution," he claims, "that member states cannot be bound by the provisions of conventions which they

4 *Supra*, note 1, at p. 366 (emphasis added).

5 *Supra*, note 2, at para. 69. In the Supreme Court's exact words, "Canada's international obligations can assist courts charged with interpreting the *Charter's* guarantees."

6 *Ibid.*

7 E. Gravel, I. Duplessis & B. Gernigon, *The Committee on Freedom of Association: Its Impact over 50 Years* (Geneva: International Labour Office, 2002).

have not ratified.”⁸ That claim, which is commonly made by employer interests, is inconsistent with the ILO’s recently and explicitly stated view that all of its member states have obligations under its constitution⁹ over and above their duties under the conventions they have ratified.

2. THE ILO COMMITTEE ON FREEDOM OF ASSOCIATION

The Declaration on Fundamental Principles and Rights at Work, adopted by the ILO in 1998 with strong support from Canada, provides as follows:

[A]ll Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- a. freedom of association and the effective recognition of the right to collective bargaining

The duty to respect ILO principles on freedom of association became a requirement for all ILO members when the 1944 Declaration of Philadelphia, which made prominent reference to freedom of association, became part of the ILO’s constitution.¹⁰

To promote compliance with that requirement, a process was created under which a committee of the Governing Body of the ILO — that is, the CFA —

8 *Supra*, note 1, at p. 369.

9 The ILO constitution is considered to be a treaty. N. Rubín, in consultation with E. Kalula & B. Hepple, *Code of International Labour Law*, vol. 1, “Essentials of International Labour Law” (Cambridge: Cambridge University Press, 2005), at p. 3.

10 H. Bartholomei de la Cruz, G. von Potobsky & L. Swepston, *The International Labor Organization, the International Standards System and Basic Human Rights* (Boulder, Colorado: Westview Press, 1996). Freedom of association was mentioned in the preamble of the ILO’s initial constitution but the Declaration of Philadelphia made more emphatic the obligations of all members to comply with the organization’s relevant principles.

examines complaints containing allegations of violations of the Conventions on freedom of association, regardless of *whether or not* the countries concerned have ratified those instruments. The consent of the governments concerned is not necessary in order for these complaints to be examined: the legal basis for this concept resides in the Constitution of the ILO and the Declaration of Philadelphia, according to which member States, by virtue of their membership in the Organization, are bound to respect the fundamental principles contained in its Constitution, particularly those concerning freedom of association.¹¹

As Rubin, Kalula and Hepple have noted,¹² “[t]he extent to which the aims and purposes contained in the [ILO] Constitution are binding in law must remain an open question.” However, those authors go on to state as follows:

In one instance . . . concerning freedom of association, a special procedure was adopted in 1951 onwards to give effect to the principles relating to that subject. Both the procedure and the principles, as subsequently elaborated, have come to be accepted as binding on Member States of the ILO, and their constituents, as part of the obligations assumed upon membership of the Organisation.¹³

The “special procedure” referred to by Rubin *et al.* allows unions or employers in specific cases to bring to the CFA complaints regarding alleged infringement of freedom of association. As Professor Langille observes,¹⁴ the CFA was originally established to make recommendations to the Governing Body as to whether or not it should establish a Fact Finding and Conciliation Commission on Freedom of Association to deal with a particular complaint. As he further notes,¹⁵ such commissions were rarely established because the ILO constitution precluded that from being done without the consent of the relevant government, which was difficult to obtain. Since the major function of the CFA was to make recommendations to the

11 Committee of Experts on the Application of Conventions and Recommendations, *Freedom of Association and Collective Bargaining* (Geneva: International Labour Office, 1994), at para. 19 (emphasis in original).

12 Rubin *et al.*, *supra*, note 9.

13 *Ibid.*, at pp. 4 and 5.

14 *Supra*, note 1, at p. 371.

15 *Ibid.*

Governing Body, the CFA was free to proceed itself to investigate complaints, without the need for such consent.

Thus, although the CFA was not intended to be a judicial body, over the years it has acquired a “quasi-judicial” character.¹⁶ In order to fulfill its preliminary investigative duties, the CFA began early on to “bring to the attention of governments the anomalies that it had noted so that they could be corrected.”¹⁷ It later began to add to its conclusions “a paragraph proposing that the government concerned be invited to state, after a period that is reasonable in the circumstances of the case, what action it has been able to take on the recommendations made to it.”¹⁸ This procedure was accepted by the Governing Body, and member states generally comply with it. Thus, although the procedure was not part of its original function, the CFA has issued over 2,500 opinions on inconsistencies between international standards and practices in particular countries. It has, in conjunction with the Committee of Experts on the Application of Conventions and Recommendations (known as the Committee of Experts), thereby amassed “a veritable international *corpus juris* in the field of freedom of association.”¹⁹

In developing its case law, the CFA has consistently drawn upon Conventions 87 and 98, and has closely coordinated its efforts with those of the Committee of Experts, whose function is to oversee ratified conventions. Professor Langille is correct in pointing out that only the International Court of Justice has the formal capacity to rule authoritatively on the meaning of the ILO’s constitution and conventions.²⁰ Nevertheless, through custom and practice, the special procedure of the CFA and the jurisprudence arising from it have “come to be accepted as binding.”²¹ In short, although it may or may not be correct to say that Canada has no duties flowing from Convention 98, it clearly does have freedom of association duties that flow directly

16 International Labour Office, *ILO Principles, Standards and Procedures Concerning Freedom of Association* (Geneva: ILO, 1989).

17 Bartholomei de la Cruz, von Potobsky & Swepston, *supra*, note 10, at p. 101.

18 Gravel, Duplessis & Gernigon, *supra*, note 7, at p. 12.

19 International Labour Office, *supra*, note 16, at p. 10.

20 *Supra*, note 1, at p. 376.

21 Rubin *et al.*, *supra*, note 9, at p. 31.

from the ILO constitution, and those duties are in effect identical to what Convention 98 requires.²²

“In order to establish the existence of a customary international law norm,” William Schabas has written, “there must be evidence of state practice and a consistent and uniform usage, accepted as law by the state itself as *opinio juris*.”²³ In other words, states must conform to the norm out of a sense of legal obligation. That Canadian governments do feel obliged to respect both the procedure and the principles developed by the CFA is illustrated by the interaction between the British Columbia government and the CFA regarding the circumstances that gave rise to the litigation in *B.C. Health Services*. In addition to bringing a court challenge under the *Charter*, the unions affected by the legislation in question also filed a complaint with the CFA. In assessing that complaint, the CFA clearly held the B.C. government to “principles” derived from Convention 98. In its response, the B.C. government did not challenge the authority of the CFA to judge it on those standards. Instead, it engaged with the CFA in a conversation about the extent to which its actions complied with Canada’s international obligations.

The CFA summarized the complaints as follows:

The complainants . . . allege that Bills Nos. 2, 15, 18, 27, 28 and 29 violate ILO Conventions and freedom of association principles, and created a situation where employers are not inclined to utilize collective bargaining procedures, but rather refuse to bargain and await the legislated imposition of their concession demands, in both the public health and educational

22 With regard to Convention 87, Rubin *et al.* note that “there is for all practical purposes very little (if anything at all) to distinguish what is required regarding freedom of association from those governments which have ratified the Convention and those which have not. Both the CEACR and the CFA, acting in terms of decisions taken by the Governing Body from 1951 onwards, have applied identical principles and standards to all Member States and their social partners. Those principles and standards have been developed in relation to the instruments, but apply irrespective of any Member State’s express decision that they should do so.”

23 W.A. Schabas, *International Human Rights Law and the Canadian Charter*, 2d ed. (Scarborough, Ontario: Carswell, 1996), at p. 17.

sectors. The complainants add that this discourages the use of voluntary bargaining between employers and workers for the settlement of conditions of employment.²⁴

In responding to those allegations, the B.C. government did not deny that it had international obligations with regard to collective bargaining and the right to strike — obligations that can be traced to Convention 98 rather than Convention 87. Rather, it argued that its impugned legislative interventions were temporary and unusual, and had been prompted by an acute fiscal crisis in health care and education. In the CFA's words, the government argued as follows:

... it was recently elected with a wide mandate to improve fiscal accountability and reduce the public deficit and the debt. The measures it took through Bills Nos. 2, 15, 18, 27, 28 and 29 were not adopted arbitrarily but rather to respond to a preoccupying situation in the public health and education sectors. Any restrictions on collective bargaining or on the right to strike were exceptional measures, enacted in view of the difficult economic and fiscal situation, in the context of protracted and difficult labour disputes, which could have serious consequences in the health and education sectors.²⁵

Temporary and unusual interventions in collective bargaining are permitted under international standards in certain extreme circumstances. In this case, the CFA did not agree that the circumstances at hand were extreme enough to justify the government's action, or that the government had made use of the options open to it under those standards. Once again, it should be emphasized that, as governments around the world generally do, the B.C. government engaged with the CFA in a dialogue about its international responsibilities. Even though the CFA was applying standards derived from Convention 98 rather than from Convention 87, the government did not challenge the CFA's authority, and indeed would have had no basis for doing so.

The bottom line is that had the Supreme Court indeed sought to establish Canada's *legal* obligations before the ILO, as Professor

24 Committee on Freedom of Association, Case(s) No(s). 2166, 2173, 2180, 2196, Report No. 330 (Canada), vol. LXXXVI, 2003, Series B, No. 1 (Geneva: ILO, 2003), at para. 266.

25 *Ibid.*, at para. 269.

Langille claims it did, the Court would have been well justified in referring to the ILO's collective bargaining principles, even if those principles were not set out in any convention ratified by Canada. To review, the CFA draws its authority from the ILO Constitution and the Governing Body. Its function is to determine the meaning in specific cases of the constitutional obligation to respect freedom of association, an obligation freely entered into by all member states. In carrying out that function, it has consistently made reference to the principles contained in Conventions 87 and 98. That process has been widely accepted by ILO member states including Canada. The result is that, for all practical purposes, the obligations of those states that have not ratified the two conventions are identical to those of the states that have ratified them.

3. OTHER INTERNATIONAL COVENANTS

Beyond its duties under ILO instruments, Canada has also incurred legal obligations by ratifying two United Nations Covenants — the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights. Freedom of association is identified as a human right in both of those documents, and its meaning in that context has been the subject of decisions by the UN's oversight committees. Both of the UN instruments make reference to ILO Convention 87, effectively incorporating that convention and the ILO jurisprudence on it.²⁶ Even though the bodies that monitor compliance with those covenants have not made reference to Convention 98, Patrick Macklem has rigorously documented the fact that those bodies have recently interpreted freedom of association “to include a right to bargain collectively.”²⁷ It is reasonable to conclude that over and above Canada's ILO duties, its treaty responsibilities arising from the UN covenants include respect for the body of international law that has developed on collective bargaining.

26 L. Swepston, “Human Rights Law and Freedom of Association: Development through ILO Supervision” (1998), 137 Int'l Lab. Rev. 169, at p. 172.

27 P. Macklem, “The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?” in P. Alston, ed., *Labour Rights as Human Rights* (Oxford: Oxford University Press, 2005) 61, at p. 73.

In short, Canada not only has legal obligations stemming from its ratification of Convention 87, but also has legal obligations under the ILO constitution and the two UN covenants. The international jurisprudence reviewed by Gernigon *et al.*,²⁸ and referred to prominently by the Supreme Court in *B.C. Health Services*, is relevant to all of those obligations.

4. THE DUTY TO BARGAIN

Also central to Professor Langille's critique is his assertion that the right to bargain collectively in international law does not embrace an employer duty to bargain in good faith. On that basis, he argues, the Supreme Court of Canada wrongly relied on international law to support its constitutionalization of a notion of collective bargaining that unequivocally includes a duty to bargain.

Among the principles of collective bargaining drawn from the jurisprudence of ILO oversight committees summarized by Gernigon *et al.* in the article quoted by the Supreme Court is the requirement that states "take measures to encourage and promote the full development and utilization of machinery for 'voluntary negotiation between employers . . . and workers.'" ²⁹ Professor Langille puts great stress on the word "voluntary." Although he acknowledges (as Gernigon *et al.* noted, without negative comment) that the CFA recognizes that "[t]he obligation to negotiate is imposed in certain countries" and that it does not criticize the imposition of such a duty, he nonetheless asserts that "it is inconsistent with the core idea of [Convention 98], which is the voluntariness of collective bargaining."³⁰

While the ILO does place considerable emphasis on "voluntariness," it is not an absolute principle. What is seen as the ideal is that employers should "voluntarily" recognize and bargain in good faith with representative trade unions, without having to be compelled to do so. That was the sense in which the term was used in the interchange between the B.C. government and the CFA. The principle of

28 B. Gernigon, A. Otero & H. Guido, "ILO Principles Concerning Collective Bargaining" (2000), 139 *Int'l Lab. Rev.* 33.

29 *Supra*, note 1, at p. 381.

30 *Ibid.*, at p. 382.

voluntariness should not, however, be interpreted as condonation of employer intransigence. To do so would undermine “a fundamental requirement for the ILO itself in view of its tripartite nature.”³¹ As summarized by Gernigon *et al.* and referred to by the Supreme Court, ILO jurisprudence also holds as follows:

The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking in account the results of negotiations in good faith.³²

Nor have the ILO oversight committees found legislative compulsion of good-faith bargaining to be inconsistent with international norms. In several General Surveys by the Committee of Experts, the practice of some governments to require employers to bargain in good faith has been referred to without negative comment. In its 1994 survey, for example, the Committee of Experts stated:

The provisions governing the recognition of trade unions are also closely linked to the obligation to bargain which in some legislation takes the form of the obligation of the parties to “negotiate in good faith,” compliance with this requirement and its consequences being evaluated by specialized bodies. In several countries legislation makes the employer liable to sanctions if he refuses to recognize the representative trade union, an attitude which is sometimes considered as an unfair labour practice. The Committee recalls in this connection the importance which it attaches to the principle that employers and trade unions should negotiate in good faith and endeavour to reach an agreement³³

In a footnote to the above paragraph, the Committee of Experts noted favourably that “several countries have adopted legislation prohibiting . . . practices that are detrimental to collective bargaining.” Canada was listed as one of them, implying that Canadian law requiring bargaining in good faith was consistent with international labour law.

In its 1983 survey, the Committee of Experts said:

31 Gravel, Duplessis & Gernigon, *supra*, note 7, at p. 7.

32 Cited in *supra*, note 1, at p. 382.

33 Committee of Experts on the Application of Conventions and Recommendations, *Freedom of Association and Collective Bargaining* (Geneva: International Labour Office, 1983), at para. 243.

Numerous legal systems spell out this obligation in greater or lesser detail and in some cases decisions of the bodies responsible for administering recognition procedures have specified exactly what the obligation involves.

- Refusal by an employer to recognize the designated or representative trade union and,
- sometimes, the fact that an employer bargains with another trade union or
- does not bargain in good faith with the agent granted this exclusive right (an attitude sometimes regarded as an unfair labour practice),
- may give rise to special proceedings for damages or the application of sanctions.³⁴

Indeed as Bartolomei de la Cruz, von Potobsky and Swepston have put it, “[w]ithout recognition of the right to negotiate, the rest of the guarantees in [Convention 98] are meaningless.”³⁵

5. CONCLUSION

In *B.C. Health Services*, the Supreme Court of Canada was on firm ground in drawing on international law for help in interpreting the meaning of freedom of association under the *Canadian Charter of Rights and Freedoms*. International human rights law is rapidly expanding, and has increasingly come to be referred to by domestic courts in Canada and elsewhere.³⁶ Much of international law stems not from specific clauses in ratified documents but rather from the acceptance of international obligations through custom and practice. The process through which the jurisprudence of the ILO’s specialized committees has come to be accepted as binding is not entirely dissimilar to how arbitral jurisprudence has come to be seen very broadly as the standard of acceptable human resource management practice in Canada. Finally, the Supreme Court was also on firm ground in delineating the extent of Canada’s international obligations; as I have tried to show, the Court’s interpretation of international law as including a duty to bargain was a reasonable one.

34 Cited by Rubin *et al.*, *supra*, note 9, at p. 328.

35 *Supra*, note 10, at p. 228.

36 H. Klug, “Transnational Human Rights: Exploring the Persistence and Globalization of Human Rights” (2005), 1 *Ann. Rev. L. & Soc. Science* 85.